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No. ____

In The

Supreme Court of the United States

October Term, 1994

MOHAMED EL-HAWATKY, et al.,

Petitioners,

v.

KAISER FOUNDATION HOSPITALS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Third District Appellate Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a State court violates the United States Constitution's Fourteenth Amendment due process right of a party to an arbitration agreement where it refuses to review the award for the arbitrator's failure to consider evidence of both parties, or for any reason, and "rubber stamps" all arbitration awards?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Third District Court of Appeal filed on January 5, 1995.

OPINIONS BELOW

The Arbitration Award was filed with the Superior Court of Sacramento County, California on October 29, 1993. Appendix A, A-1. The Arbitration Award was affirmed by the Superior Court of Sacramento County, California on November 19, 1993. Appendix B, A-2. The Third District Court of Appeal, California, affirmed the

judgment on January 5, 1995. Appendix C, A-3. The California Supreme Court denied the plaintiff's Petition for Review on March 22, 1995. Appendix D, A-4.

JURISDICTION

The California Supreme Court denied the plaintiff's Petition for Review on March 22, 1995. That decision is attached as Appendix D, A-4. This petition for writ of certiorari follows within 90 days.

28 U.S.C. § 2101(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, § 1, United States Constitution:

" . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

A. Factual Background

On July 18, 1990, petitioner, Mohamed El-Hawatky had a heart attack. He was taken to respondent Kaiser Foundation Hospitals for treatment. He was given an EKG which indicated conclusively that he was suffering an acute MI (a heart attack). The proper treatment as conclusively established by expert testimony would have

been to administer TPA. The Kaiser cardiologist, Dr. Tillinghast, declined to do so.

At the arbitration, the arbitrator heard several experts on the issue of whether TPA should have been administered. Petitioners' experts stated unequivocally that TPA should have been administered and that had it been administered, Mr. El-Hawatky probably would have fully recovered. In the arbitrator's Ruling the arbitrator referred to petitioners' experts' testimony and misquoted, misconstrued and misinterpreted it in its entirety. Specifically, he said that both of petitioners' experts had testified that "though a majority of cardiologists would err on the side of giving the TPA, a minority group would not give the drug and would err on the side of caution." Appendix A,

A-1. The arbitrator based his ruling on this evidence – that, at the very least all experts believed that there was a difference of opinion as to whether to give TPA. However, both of petitioners' experts testified in affidavits filed with the Petition to Reject Arbitration Award that they had never made such a statement. The arbitrator based his Award on evidence that did not exist.

B. Procedural History

The arbitration was conducted on June 14, and 15, 1993. The Arbitration Award against petitioners and for respondents was filed with the Superior Court of Sacramento County, California on October 29, 1993. Appendix

A, A-1. The Award relied on certain statements purportedly made by petitioners' experts. The Award completely misquoted the testimony of the petitioners' experts.

Petitioners filed a Petition to Reject Arbitration Award and Request for Trial De Novo with the Superior Court of Sacramento County, California on October 29, 1993. The Petition was based upon the fact that the arbitrator completely misquoted the testimony of petitioners' experts. The Sacramento Superior Court denied the Petition to Reject Arbitration Award and entered judgment for the respondents on November 19, 1993. The Order was without explanation and cited only *Moncharsh* v. *Heily & Blase*, 3 Cal.4th 1 (1992) and California Code of Civil Procedure § 1286.2. Appendix B, A-2.

Petitioners appealed the judgment on the basis that, in failing to consider their evidence in making his Award the arbitrator denied them their due process right to a fair hearing, under the Fourteenth Amendment to United States Constitution.

The Third District Court of Appeal of California affirmed the judgment in an unpublished, written opinion filed on January 5, 1995. Appendix C, A-3. It held that it could not review the decision of the arbitrator, citing *Moncharsh* (*supra*). Appendix C, A-3. It further found that the California arbitration statutes set out the procedural rights due a party to arbitration, which are different from those required under the due process clause of the Fourteenth Amendment to U.S. Constitution, and those statutory rights were not violated. Therefore, it concluded that the petitioners' Fourteenth Amendment due process

rights had not been violated due to the failure of the arbitrator to consider the petitioners' evidence. Appendix C, A-3.

Petitioners petitioned the California Supreme Court for review of the Third District Court of Appeal's decision. On February 14, 1995, the California Supreme Court denied that Petition. Appendix D, A-4.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE DUE PROCESS ISSUE PRESENTED HEREIN AND RESOLVE THE INHERENT CONFLICT WITH THE FEDERAL COURTS OF APPEAL ON THIS ISSUE.

The petitioners below petitioned the Superior Court of Sacramento County to vacate the arbitrator's award in this matter. They based this petition on the fact that the arbitrator purported to rely on certain statements made by the petitioners' experts. The petitioners' experts never made such statements. Had the arbitrator considered petitioners' evidence as presented, the award certainly would have been different.

The petitioners appealed the judgment of the Superior Court of Sacramento County, California arguing that the failure to consider petitioners' evidence constituted denial of petitioners' due process right under the Fourteenth Amendment to the U.S. Constitution.

The California Third District Court of Appeal refused to review the arbitrator's decision or the evidence considered in rendering said decision. The Court of Appeal said that " . . . an arbitrator's decision to which the parties agree to be bound may not be reviewed for mistakes of law or fact, even if such a mistake causes substantial injustice." Appendix C, A-3.

The court went on to say that "unless the parties specify in their arbitration agreement a different scope of judicial review, a court may not review the merits of the controversy or the sufficiency of the evidence to support the arbitrator's findings." Appendix C, A-3.

This is in direct conflict with decisions on the subject rendered in various United States Courts of Appeal.

The Tenth Circuit has said, "Although courts have a limited function when called upon to confirm or vacate an arbitration award, such a review is *necessary* to ensure arbitrators comply with statutory requirements." It cited *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987) for this proposition. *Bowles Financial Group* v. *Stifel, Nicolaus & Co.*, 22 F.3d 1010 (10th Cir. 1994).

Many federal appellate courts have articulated the standard for judicial review of arbitration procedures as whether a party to arbitration has been denied a fundamentally fair hearing. *National Post Office Mailhandlers, Watchmen, Messengers & Group Leaders Div., Laborers Internatl. Union of North America, AFL-CIO* v. *U.S. Postal Service*, 751 F.2d 834, 843 (6th Cir. 1985); *Grahams Service, Inc.* v. *Teamsters Local 975*, 700 F.2d 420, 422 (8th Cir. 1982).

The Fifth Circuit has also so held. "Review is not absolutely foreclosed where petitioner alleges a denial of fundamental due process". *Hall* v. *Eastern Air Lines, Inc.*, 511 F.2d 663, 664 (5th Cir. 1975).

The First Circuit has found that the refusal to give any weight to evidence admitted at the arbitration constitutes deprivation of a full and fair hearing. In so holding, it noted that "the arbitrator's role is to resolve disputes, *based on consideration of all relevant evidence. . . . " Hoteles Condado Beach, Etc.* v. *Union De Tronquistas Local 901*, 763 F.2d 34, 37-38 (1st Cir. 1985) (emphasis added). It stated, "The arbitrator must . . . determine the truth respecting material matters in controversy . . . based upon a full and fair consideration of the *entire evidence. . . . " Id.* at p. 39 (emphasis added).

In *Hoteles Condado Beach*, the arbitrator admitted the transcript of the criminal proceeding previously had in the same matter, but refused to accord it any weight. The First Circuit said, "the arbitrator's refusal to ascribe any weight to the testimony given at the criminal proceedings effectively denied the Company an opportunity to present any evidence in the arbitration proceeding." *Id.* at p. 40.

The Ninth Circuit has said that a hearing before an arbitrator is fundamentally fair if it meets the minimal requirements of fairness, that is, adequate notice, a hearing *on the evidence*, and an impartial decision by the arbitrator. *Sunshine Mining Co.* v. *United Steelworkers of America, AFL-CIO, CLC*, 823 F.2d 1289 (9th Cir. 1989).

The Eleventh Circuit makes clear that there is available some review of arbitration awards. The denial of a

motion to vacate an Arbitration Award is reviewed for abuse of discretion. *Brown* v. *Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 780 (11th Cir. 1993).

The Eleventh Circuit has also said that a court may vacate an arbitrator's award for refusing to hear pertinent and material evidence if the arbitrator's refusal prejudices the rights of the parties and denies them a fair hearing. *Robbins* v. *Day*, 954 F.2d 679, *cert. denied*, 113 S.Ct. 201 (11th Cir. 1992.) This clearly requires some review of the record of the arbitration.

The Third Circuit also provides that review of the arbitration record is often necessary. That Court has held that, " . . . if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." *N F & M Corp.* v. *United Steelworkers of America*, 524 F.2d 756 (3rd Cir. 1975). This holding makes clear that the failure of the arbitrator to base his award on the evidence is grounds for vacating the award.

The Sixth Circuit has said that

> " . . . where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact *and* the record demonstrates strong reliance on that mistake by the arbitrator in making his award, it can fairly be said that the arbitrator exceeded his powers, or so imperfectly executed them, that vacation [of the arbitration award] may be proper." *National Post Office, supra*, 751 F.2d at p. 843 (emphasis in original).

In interpreting the term "undisputed" as used by the Sixth Circuit in *National Post Office* (*supra*), the Fifth Circuit has said that the test is whether there is any rational basis for disputing the truth of the fact. *Valentine Sugars, Inc.* v. *Donau Corp.*, 981 F.2d 210, *cert. denied*, 113 S.Ct. 3039 (5th Cir. 1993). As in other Federal Circuits, this requires review of the record.

The Eighth Circuit has also held that vacation of an arbitration award is proper if the arbitrator based the award on a factual assumption which was both central to the decision and incorrect. *United Electric, Radio & Machine Workers Local 1139* v. *Litton*, 704 F.2d 393 (8th Cir. 1982).

Under the law in any Federal Circuit Court of Appeal, a decision such as that made by the Superior Court of Sacramento County, California would be reviewed. In most circuits, the decision would be reversed and the Arbitration Award vacated for the blatant failure of the arbitrator to consider the evidence of both parties.

The rule in California deviates flagrantly from the law in the Federal Circuits. Certiorari should be granted to determine if such deviation constitutes a denial of petitioners' federal due process rights.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT DUE PROCESS CONFLICT AMONG STATE COURTS AS TO WHETHER A STATE COURT MUST REVIEW AN ARBITRATION AWARD BASED ON EVIDENCE THE ARBITRATOR MISCONSTRUED OR FAILED TO CONSIDER.

California is the only state that allows "rubber stamping" of arbitration awards. States which provide for arbitration and Federal Courts of Appeal (discussed above) allow *some* judicial review of arbitration awards.

The Massachusetts Supreme Court has held that, in the absence of an agreement to the contrary, the requirement that the arbitrators must meet and hear the parties implies that relevant evidence, if offered, shall be received and *considered. Second Soc. of Universalists* v. *Royal Ins. Co.*, 109 N.E. 384, 386 (Mass. 1915) (emphasis added).

The Supreme Court of New Jersey has said, " . . . an arbitration award may be vacated if it is shown not to be supported by any evidence in the record. This conclusion is firmly supported by federal case law." *McHugh, Inc.* v. *Soldo Const. Co., Inc.*, 569 A.2d 293, 295 (N.J. Super. A.D. 1990).

The Maryland Supreme Court has held that an arbitration award may be vacated for a palpable mistake of law or fact apparent on the face of the award or for a mistake so gross as to work manifest injustice. *Board of Education* v. *P. G. Co. Educators' Assn.*, 522 A.2d 931 (Md. 1987).

The Connecticut Supreme Court allows review of arbitration awards under its state arbitration statute on the ground that the arbitrator refused to receive material evidence. To support such a claim, the challenging party must prove that by virtue of an evidentiary ruling, he was deprived of a full and fair hearing before the arbitrator. *O & G/O'Connell Jt. V.* v. *Chase Fam. Ltd Ptp.*, 523 A.2d 1271 (Conn. 1987).

There is a definite conflict between the California Supreme Court and those of other states. The decision of the California Court of Appeal considering the federal due process question and holding that parties to an arbitration agreement have no right to have their evidence considered or to have the arbitration award reviewed is in conflict with supreme court decisions of other states. Certiorari should be granted so that this question may be resolved and the state courts afforded some guidance on this issue.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE FEDERAL QUESTION PASSED ON BY THE CALIFORNIA APPELLATE COURT, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The California Court of Appeal, Third District, held that petitioners have no federal due process right to have their arbitration award based on the evidence presented or to have their arbitration award reviewed at all, even in the face of substantial injustice. Appendix C, A-3.

Until recently, the California Supreme Court has articulated the rule in cases reviewing arbitration awards

as allowing vacation where the award was substantially unjust. Justice Kennard stated, in her dissent to *Moncharsh* (*supra*), "Fairly read, the decisions of this court, although varying semantically, uniformly and firmly support the proposition that the judiciary will not knowingly perpetuate and enforce an arbitration award that is substantially unjust." 3 Cal.4th at pp. 36-37.

California courts have consistently reaffirmed the California Supreme Court's rule that a court would vacate an arbitration award where error appeared on the face of the award and that error caused substantial injustice. See *Cobler* v. *Stanley, Barber, Southard, Brown & Associates*, 217 Cal.App.3d 518, 526 (1990); *All Points Traders, Inc.* v. *Barrington Associates*, 211 Cal.App.3d 723, 736 (1989); *National Football League Players' Assn.* v. *National Football League Management Council*, 188 Cal.App.3d 192, 199 (1986); *Ray Wilson Co.* v. *Anaheim Memorial Hospital Assn.*, 166 Cal.App.3d 1081, 1090 (1985).

In 1992, the California Supreme Court in *Moncharsh* suddenly narrowed its rule so significantly that it now allows virtual "rubber stamping" of all arbitration awards regardless of clear error on the face of the award or substantial injustice. 3 Cal.4th at p. 33.

Under California law as it stands, when a trial court is presented with an arbitration award that is erroneous on its face and which will cause substantial injustice, the court has no choice but to confirm it. *Moncharsh*, pp. 6, 33. California state trial courts are now duty-bound to confirm arbitration awards they know to be manifestly wrong and substantially unjust. Accord the Superior

Court of Sacramento County's judgment below summarily affirming the Arbitration Award without reason, merely citing *Moncharsh*. Appendix B, A-2.

Such a rule impliedly abrogates the judiciary's solemn obligation to do justice in favor of the general policy encouraging arbitration.

The California Supreme Court begins with the well-known proposition that arbitration is generally faster and cheaper than judicial proceedings with fewer safeguards against error, and where parties therefore are deemed to have accepted the increased risk of error. However, it takes this rule far beyond its logical mandates. From that proposition, it then makes the leap that parties who agree to arbitration thereby agree also to be bound by an award that on its face is manifestly erroneous and results in substantial injustice. Such a result is not logical or conceivable. Parties who wish to have their disputes arbitrated should not be required to assume a risk that is so unnecessary and self-destructive.

Respondent Kaiser Foundation Hospitals is one of the largest employee health care organizations in the nation. Parties who contract with respondent or other health insurers for health care and thereby submit to arbitration do not have any bargaining power. As such, these contracts are contracts of adhesion.

In California, parties who contract with health insurers such as respondent, and agree to arbitration, are bargaining away not only their right to have any dispute litigated in a court of law, but the right to have their case fairly decided when the hospital makes an error. This is unjust. A hospital is not merely a business. A contract for

health insurance is not merely a contract. A contract for health care concerns more than money. As exemplified in the present case, a contract for health care concerns people's physical well-being and very often, their lives.

Health care and the acquisition of health insurance has become a great concern in this country. The present difficulty in obtaining health care requires employees'/ patients to enter into contracts in which they have no bargaining power and to take what they are given, in order to obtain health care. By submitting to arbitration without review by a court of law, they are putting their physical well-being into the hands of a company which may never be held accountable for errors it makes, no matter how gross or far-reaching. In California, once an arbitrator rules on a case of medical malpractice, even if he has completely misunderstood the evidence, that ruling must necessarily stand, regardless of how unjust.

The facts of the instant case amply demonstrate the extent to which an arbitrator may err and still be upheld by the courts. They also demonstrate the extent to which an individual can suffer due to the negligence of a health care provider and not be recompensed as a result of a gross misconstruction of the evidence by an arbitrator.

Parties who wish to contract with respondent or other health insurers should not be required to submit to a proceeding with no ability for review by the courts for blatantly erroneous determinations concerning their lives and their physical health. Parties to adhesion contracts should have even greater protection since they are lay persons with no knowledge of the legal system or what

rights they would be giving up in submitting to arbitration. A person should not have to give up his right to legal recourse for the errors of others in order to secure health care.

Courts should refuse to permit use of the judiciary's awesome coercive power to perpetrate a substantial injustice and should refuse to be "the abettor of iniquity." *Precision Co.* v. *Automotive Co.*, 324 U.S. 806, 814 (1945).

CONCLUSION

For all the previously stated reasons, petitioner Mohamed El-Hawatky prays that this court grant a writ of certiorari to review the decision of the Third Circuit Appellate Court of California.

Dated: June 14, 1995

Respectfully submitted,

WILLIAM M. LYONS, Bar No. 42558
Attorney at Law

APPENDIX A

Petitioners' Exhibit C

Retired Superior Court Judge
WILLIAM M. GALLAGHER, Neutral Arbitrator
c/o HEFFNER, STARK & MAROIS
2710 Gateway Oaks Drive
Suite 300 South
Sacramento, California 95833

IN THE MATTER OF THE ARBITRATION OF

MOHAMMED EL-HAWATKY	)	
Plaintiff	)	RULING
vs.	)	
KAISER/DR. TILLINGHAST	)	
Defendants.	)	

James Kirk, M.D., a second year resident on duty in the Emergency Room at Kaiser Hospital on July 18, 1990, examined the plaintiff, interpreted the first EKG taken at 9:07 a.m., concluded that plaintiff was suffering from an "acute anterior wall MI" and prescribed thrombolytic therapy to dissolve what he perceived to be a clot subject to the opinion of the Department of Cardiology. Craig Scott Smith, M.D., a specialist in internal medicine, on call in the Kaiser Emergency Room, also concluded from the EKG that the plaintiff was experiencing an acute heart attack at the time of the EKG though he deferred the decision of treatment to Dr. Tillinghast, member of the Department of Cardiology. Dr. John O'Brien, M.D., a cardiologist from San Francisco, engaged as an expert by the

plaintiff, opined that the first EKG indicated an acute MI occurring when the EKG was taken at 9:07 and that Dr. Tillinghast acted below the standard of care in not administering TPA immediately to break down any blood clot that was obstructing the vessel. Dr. Marquardt, an M.D., a cardiologist, and the treating physician for plaintiff during his stay at the Mercy Hospital; and the doctor Kaiser referred the case to for cardiac catheterization, also expressed the opinion that the first EKG indicated a myocardial infarction was occurring at the time of the EKG test and stated that Dr. Tillinghast should have administered TPA following said test result. He also was of the opinion that Dr. Tillinghast acted below the standard of care. This is strong medical evidence to support plaintiff's allegation of professional negligence.

Dr. Edwin Alderman, a Board Certified Cardiologist from Stanford University Medical School, takes issue with some of these opinions and particularly with the standard of care opinions of Dr. John O'Brien and Dr. Marquardt.

All expert testimony is in agreement that TPA can only be of beneficial effect if the drug is given in the first 4 to 6 hours following the onset of an MI. The medical history and testimony of the claimant indicates that he experienced the onset of chest pain near the hour of 8:00 a.m. on June 18, 1990, so we are talking about critical hours up to and including 2:00 p.m. However, it seems to be uncontroverted that the chances of success of diminishing a clot are increased considerably by treatment in the first hour or hour and a half following the onset of the attack. The beneficial effects diminish thereafter as time passes.

Dr. Tillinghast was concerned about the age of the anterior MI – that is when did it occur. He testified that though he felt an infarction was most likely occurring in the first EKG taken at the hour of 9:07, he felt he should wait for a while, take another EKG and be more certain of the timing of the onset and the age of the infarction. In the meantime he prescribed Nitroglycerin, Aspirin and Neparin for the chest pain which all agree is appropriate care in the absence of the use of thrombolytics. The patient reported to the hospital interviewer that he had chest pains over the last month with exertion, and Dr. Tillinghast thought that the patient's history sounded like ischemia. In following what he perceived to be required under the Kaiser protocol, he waited for a second EKG which was performed at the hour of 10:20 a.m. This EKG was interpreted by Dr. Tillinghast to show improvement and didn't meet Kaiser protocol to administer TPA. Though the second EKG did not rule out an infarction, Dr. Tillinghast was not sufficiently satisfied that there were not earlier infarctions which process was continuing and which would not be helped by use of TPA because of the time intervals. He was also concerned about a hemorrhagic stroke, a known side effect of the drug.

Dr. Marquardt concedes that the second EKG alone was not diagnostic of an MI, though he opined that, when compared with his interpretation of the first EKG, there was sufficient evidence of an existing myocardial infarction; and that in June of 1990 the majority of cardiologists would err on the side of giving TPA to Dr. El-Hawatky. But, he concedes that, if the treating physician is not sure of a current acute myocardial infarction, it would not be below the standard of care not to administer TPA, and

that he would not give TPA based on the second EKG alone. Dr. John O'Brien, M.D., concedes that he also could not rely on the second EKG alone to diagnose the patient's condition. Both of plaintiff's experts agree that they could not predict with any reasonable medical probability that Dr. El-Hawatky would benefit from the administration of TPA, though both physicians were of the opinion if the TPA was administered early on and the clot was dissolved, there was an excellent chance that plaintiff would have recovered, and that he could have returned to work. Dr. Marquardt concedes that though TPA increases the survival rate in 85% to 95% of the cases in the population, one can't tell if TPA would work in a particular case since it doesn't work in 10% to 15% of the cases.

The defense expert, Dr. Alderman, agrees with the other experts that the first EKG confirmed the existence of an MI, but that there was a serious question of timing of when this infarction commenced. He opined that Dr. Tillinghast acted within the standard of care at the time following his reading of the first EKG in deciding not to administer TPA until another EKG was administered. Then with the second EKG at 10:20 a.m. indicating improvement in the patient's condition, his opinion was that Dr. Tillinghast acted within the standard of care in June, 1990, in deciding not to render TPA at that time. His reading of the second EKG raised serious questions about damage possibly taken place in the past. Apparently, Dr. Alderman observed "Q" waves in the second EKG that he observed were present in the first EKG and that there were indications of damage that had taken place in the past that could be two hours to many days old. Dr.

Tillinghast's concern about the timing of the infarction and improvement in the chest pain symptoms was within the standard of care in causing Dr. Tillinghast to decide not to render TPA in Dr. Alderman's opinion. He further agrees that Dr. Tillinghast's decision following the third EKG at the hour of 1:29 p.m., almost 5-1/2 hours after the initial 8:00 a.m. attack in the morning, was justified in June of 1990 and within the standard of care, because though more damage was occurring, the third EKG presented a picture of unstable aging and TPA might well be of no advantage at that time and might well be harmful.

Defense expert, Dr. Edwin Alderman, testified that it was not until the Fall of 1990 that the medical community, following the American Medical Association's national meeting, began to condone and recommend that it was better medical practice to err on the side of giving TPA in myocardial infarction cases notwithstanding the risk of strokes. He said that there was a definite change in medical attitudes following the European ISIS trials which confirmed the value of TPA in dissolving clots versus the risk of strokes which had always been of real concern.

The bottom line is that in 1990 some doctors would administer TPA and some would not in the picture presented by the first three EKG's, and that it was not a standard mandatory requirement at that time to necessarily give TPA in all cases of MI's. Dr. Marquardt agrees that in June, 1990, though a majority of cardiologists would err on the side of giving the TPA, a minority group would not give the drug and would err on the side of caution. He stated there were two schools of thought: those who were more aggressive, like himself, and those who were less aggressive in the usage of TPA. All expert

doctors are in agreement that today the standard of care would require the prescribing of TPA in all acute MI cases regardless of the concern of side effects. The dispute between them in this regard is as to when, in 1990, this became the accepted standard to follow.

Dr. Tillinghast's explanation, that following the first EKG testing he believed an infarction had occurred but that he could not determine to his satisfaction of when it occurred, seems to be a competent opinion based on his experience and training in reading EKG's. He had extensive experience in reading EKG's and his analysis was in accord with the readings by Dr. Alderman who has extensive scholarly credentials. Dr. Tillinghast considered the use of TPA, but rejected same based on his conscientious examination of all alternatives. His decision at that time does not appear to be obviously reckless, negligent or wanting of due care. He was present most of the day in question and took an active part in the entire treatment modality.

This is a very difficult case to resolve, and my sympathies are with Dr. El-Hawatky and his family. However, B.A.J.I. 6.02 states "a physician is not necessarily negligent because he or she errs in judgment or because his or her efforts prove unsuccessful. The physician is negligent if the error, judgment or lack of success is due to a failure to perform any of the duties as defined in these instructions.

B.A.J.I. 6.00 requires a physician to use the care and skill ordinarily exercised in like cases by reputable members of the profession practicing in the same or a similar

locality under similar circumstances and to use reasonable diligence and his or her best judgment in the exercise of skill and the application of learning, in an effort to accomplish the purpose for which the physician is employed.

I am persuaded that the medical profession was learning more about the advantages and disadvantages of the aggressive use of TPA in the calendar year of 1990, and that some physicians, though not all, became persuaded earlier than did others of the drug's value and safety in most all MI cases notwithstanding its medical risks. It was during this transition period that unfortunately Dr. El-Hawatky experienced his heart attack.

The definition of standard of care in effect means what is done and not done by the well trained and competent physician in a given set of circumstances when a patient presents himself for care. Medicine is not always an exact science and in some disorders there are different opinions and courses of action that one group may follow and a different course of action that another group may adhere to, and still be within the standard of care. This is the situation in Dr. El-Hawatky's case. It cannot be argued in my judgment in this case that Dr. Tillinghast did not use reasonable diligence and in his best judgment the exercise of his medical skills based on his professional learning in an effort to treat Dr. El-Hawatky successfully. He is not negligent because his judgment proved to be unsuccessful.

Under the circumstances of this case and the state of the record and applicable law, I find that the claimant has

failed to establish that Dr. Tillinghast committed professional negligence. I, therefore, find in favor of Kaiser and Dr. Tillinghast and against the plaintiff.

DATED: July 21 1993

/s/ William M. Gallagher
William M. Gallagher,
Arbitrator

WILLIAM M. GALLAGHER
Retired Superior Court Judge
c/o HEFNER, STARK & MAROIS
2710 Gateway Oaks Drive
Suite 300 South
Sacramento, California

BILLING FOR ARBITRATION SERVICES

Rate $225.00/hour

June 14, 1993	Hearing	5.5 Hours	= $1,237.50
June 15, 1993	Hearing	7.0 Hours	= 1,575.00
June 20, 1993	Review	4.0 Hours	= 900.00
June 27, 1993	Review	3.0 Hours	= 675.00
July 11, 1993	Review	4.5 Hours	= 1,012.50
July 18, 1993	Review	5.0 Hours	= 1,125.00
		Total	$6,525.00

Lillick & Charles
1/2 = $3,262.50
Kaiser Hospital

William N. Lyons
1/2 = $3,262.50
Dr. Mohammed El-Hawatky

Re: In the Matter of the Arbitration of MOHAMMED EL-HAWATKY vs KAISER/DR. TILLINGHAST

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen (18) years and not a party to the within action: my business address is 520 Ninth Street, Sacramento, California 95814.

On July 22, 1993, I mailed a true copy of the within RULING to each of the persons listed below by placing a true copy thereof for each enclosed in sealed envelopes with postage thereon fully prepaid, and depositing same in the United States Post Office at Sacramento, California, addressed as set forth below:

William N. Lyons, Esq.
LAW OFFICES OF
WILLIAM N. LYONS
A Professional Corporation
1822 – 21st Street
Sacramento, CA 95814

Thomas G. Minder
LILLICK & CHARLES
400 Capitol Mall
Suite 2300
Sacramento, CA 95814-4409

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service was executed on July 22, 1993.

/s/ Karen E. Boldt
Karen E. Boldt

APPENDIX B

LILLICK & CHARLES
THOMAS G. MINDER, ESQ. (State Bar No. 054146)
MARK A. MURO, ESQ. (State Bar No. 136305)
400 Capitol Mall, Suite 2300
Sacramento, California 95814
Telephone: (916) 442-6800

Attorneys for Defendants
THE PERMANENTE MEDICAL GROUP, INC., KAISER FOUNDATION HEALTH PLAN, INC., AND KAISER FOUNDATION HOSPITALS

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

MOHAMED EL-HAWATKY, et al., Plaintiffs, vs. KAISER FOUNDATION HOSPITALS, et al., Defendants	No. CV 521183 **JUDGMENT** TIME: 9:00 a.m. (Filed Nov. 19, 1993)

Pursuant to the Award of Arbitrator and Order Confirming Arbitration Award, judgment is hereby entered in favor of Defendants, THE PERMANENTE MEDICAL GROUP, INC., KAISER FOUNDATION HEALTH PLAN, INC., and KAISER FOUNDATION HOSPITALS, and against plaintiffs Mohammed El-Hawatky and Suema El-Hawatky.

DATED: November 19, 1993

/s/ Illegible
Judge of the Superior Court
[SEAL]

PROOF OF SERVICE

I am a citizen of the United States and am employed in the County of Sacramento. I am over the age of 18 years and not a party to the within above-entitled action; my business address is 300 Capitol Mall, Suite 1590, Sacramento, California 95814.

On November 11, 1993, I served the within

JUDGMENT

on the parties below by placing a true copy thereof in a sealed envelope and served same on the parties/counsel, addressed as follows:

Law Offices of William N. Lyons
A Professional Corporation
1822 21st Street
Sacramento, California 95814

The following is the procedure in which service of this document was effected:

X U.S. Postal Service by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a U. S. Mailbox in the City of Sacramento, California, after the close of the day's business.

_ Federal Express

_ Express Mail

_ FAX

_ Personal Service

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document is executed at Sacramento, California on November 19, 1993.

/s/ Maria Amador
Maria Amador

PROOF OF SERVICE

I am a citizen of the United States and am employed in the County of Sacramento. I am over the age of 18 years and not a party to the within above-entitled action; my business address is 300 Capitol Mall, Suite 1590, Sacramento, California 95814.

On November 11, 1993, I served the within

NOTICE OF ORDER AFTER HEARING ON PLAINTIFFS' PETITION TO VACATE ARBITRATION AWARD AND DEFENDANTS' PETITION TO CONFIRM ARBITRATION AWARD AND NOTICE OF ENTRY OF JUDGMENT

On the parties below by placing a true copy thereof in a sealed envelope and served same on the parties/counsel, addressed as follows:

Law Offices of William N. Lyons
A Professional Corporation
1822 21st Street
Sacramento, California 95814

The following is the procedure in which service of this document was effected:

X U.S. Postal Service by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a U. S. Mailbox in the City of Sacramento, California, after the close of the day's business.

_ Federal Express

_ Express Mail

_ FAX

_ Personal Service

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document is executed at Sacramento, California on December 10, 1993.

/s/ Maria Amador
Maria Amador

APPENDIX C

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MOHAMED EL-HAWATKY ET AL.
Plaintiff and Appellant

vs.

KAISER FOUNDATION
HOSPITALS ET AL.
Defendant and Respondent

3 Civil C017588
Sacramento
CV521183

(Filed
April 20, 1995)

REMITTITUR TO TRIAL COURT CLERK

I, ROBERT L. LISTON, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

Respondents to recover costs on appeal.

WITNESS my hand and the seal of the Court affixed at my office this 19th day of April 1995.

ROBERT L. LISTON, Clerk

By: /s/ Illegible
Deputy

[SEAL]

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated:

Trial Court Clerk
By: /s/
Deputy

cc: see Mailing List

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: MOHAMED EL-HAWATKY ET AL. vs.
KAISER FOUNDATION HOSPITALS ET AL.
3 Civil C017588

Copies of the attached document have been sent to the individuals checked below:

LAW OFFICE OF
WILLIAM M. LYONS
1822 21st Street
Sacramento, CA 95814

LAW OFFICE OF
MINDER & MURO
THOMAS G. MINDER
2710 Gateway Oaks Drive
Suite 200 South
Sacramento, CA 95833

LAW OFFICE OF
KENNEDY P. RICHARDSON
SAM WALKER
1611 Telegraph Avenue
Suite 707
Oakland, CA 94612

SACRAMENTO COUNTY SUPERIOR COURT CLERK
720 9th Street, Room 101
Sacramento, CA 95814

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MOHAMED EL-HAWATKY et al., Plaintiffs and Appellants, v. KAISER FOUNDATION HOSPITALS et al., Defendants and Respondents.	C017588 (Super. Ct. No. CV521183) (Filed Jan. 5, 1995)

Mohamed El-Hawatky appeals from a judgment that confirms an arbitration award for Kaiser Foundation Hospitals against his claim for medical malpractice.[1] He contends that the arbitrator misinterpreted his expert witnesses' testimony, therefore the arbitration award should have been vacated for the arbitrator's misconduct and violation of El-Hawatky's right to a fair trial. El-Hawatky also contends that he was entitled to a de novo trial.

We will affirm the judgment.

FACTS

At 8 a.m. on July 18, 1990, Mohamed El-Hawatky began to experience chest pain. An EKG taken at 9:07 a.m. in the emergency room of Kaiser Hospital indicated that El-Hawatky was experiencing an acute myocardial infarction, a heart attack. The on-duty resident prescribed thrombolytic therapy, or TPA,[2] subject to the opinion of cardiology; the on-call internist deferred the treatment decision to cardiologist Tillinghast.

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[1] El-Hawatky's wife, Suema, another plaintiff and appellant in this action, claimed loss of consortium. Her claim necessarily fell with her husband's.

Kaiser Foundation Health Plan and Permanente Medical Group are additional defendants in this action. We will refer to all defendants collectively as Kaiser.

[2] TPA is an abbreviation for tissue-type plasminogen activator, "[a] drug found very effective in treating heart attacks due to blood clots that block the coronary arteries. It stimulates the formation of plasmin (a clot-digesting enzyme) from the precursor plasminogen in the body." (4 Schmidt, Attorneys' Dictionary of Medicine (1994) p. T-129.)

TPA has no benefit if given more than four to six hours after a heart attack's onset. On the other hand, the chances of dissolving a blood clot are excellent when TPA is given within the first hour to hour and one-half. In all cases, TPA involves risk of stroke.

Dr. Tillinghast was concerned about the timing of El-Hawatky's heart attack; El-Hawatky reported that his chest pain began at 8 a.m. El-Hawatky also reported a history of chest pain, during exertion, over the preceding month, which sounded to Dr. Tillinghast like ischemia.[3] Dr. Tillinghast wanted to wait to see the results of a second EKG before deciding on treatment. Meanwhile, he prescribed nitroglycerin, aspirin and neparin for El-Hawatky's chest pain, which all experts agree is appropriate care in the absence of thrombolytic therapy.

The second EKG, taken at 10:20 a.m., showed improvement and, standing alone, was not diagnostic of a heart attack at that time. A continuing process of infarction could not be ruled out, however, as there were indications of pre-existing heart damage, from two hours to many days old. In that case, Dr. Tillinghast thought, TPA would have been of no use.

A third EKG, taken at 1:29 p.m., showed that more heart damage was occurring, and it presented a picture of

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[3] Ischemia is "[a] condition in which a part of the body suffers from a lack of blood, usually because of a contraction of the blood vessels, as in *myocardial ischemia* (caused by a narrowing of the coronary arteries). The term applies more specifically to a temporary condition of this kind." (2 Schmidt, Attorneys' Dictionary of Medicine (1994) p. I-190.)

"unstable aging." This meant to Dr. Tillinghast that TPA would be useless and that it might well be harmful.

On June 18, 1991, El-Hawatky sued Kaiser and Dr. Tillinghast for negligent treatment, causing disabling heart damage.[4]

Kaiser did not answer the complaint; rather, the parties stipulated to an order that the claim be arbitrated as provided by the Medical and Hospital Service Agreement of the Kaiser Foundation Health Plan, which says that claims of this sort "shall be submitted to binding arbitration" and that, "[w]ith respect to any matter not herein expressly provided for, the arbitration shall be governed by California Code of Civil Procedure provisions relating to arbitration."

At the arbitration hearing, El-Hawatky presented two expert witnesses, cardiologists John O'Brien and Walt Marquardt; Kaiser presented one expert witness, cardiologist Edwin Alderman. Their testimony, as summarized by the arbitrator, was in agreement that El-Hawatky's first EKG indicated that at that moment he was experiencing an acute myocardial infarction. They also agreed that the chances of successful treatment with TPA are good within the first hour to hour and one-half of a heart attack's onset,[5] that the chances diminish after that, and that TPA is of no benefit beyond four to six hours. And

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[4] Dr. Tillinghast was subsequently dismissed from the action, as he is an employee of defendant Permanente Medical Group.

El-Hawatky's wife, Suema, joined the complaint against Kaiser with a claim for loss of consortium.

[5] Dr. Marquardt put the success rate at 85 to 95 percent.

they all agreed that the second EKG was insufficient alone to diagnose an existing heart attack and to justify treatment with TPA at that time. Thus the critical question was whether Dr. Tillinghast acted below the prevailing standard of care in not treating El-Hawatky with TPA immediately after the first EKG. El-Hawatky's experts said that he did and that, had TPA been administered at that time, El-Hawatky stood an excellent chance of recovering without disability. Kaiser's expert, Dr. Alderman, said that, in light of legitimate questions about the timing of El-Hawatky's heart attack and the diminished effectiveness of TPA over time, and considering TPA's risks, it was within the prevailing standard of care for Dr. Tillinghast to have been cautious. Dr. Alderman said that it was not until the fall of 1990, following European trials that confirmed that TPA's benefits outweigh its risks, that the American Medical Association recommended it to be the better practice, in doubtful cases, to treat myocardial infarction with TPA. Thus, in June 1990, there were two schools of thought in the medical community – those who believed in the aggressive use of TPA and those who were more cautious – so the arbitrator could not say that, by prevailing norms, Dr. Tillinghast was negligent. The arbitrator ruled for Kaiser and against El-Hawatky.

El-Hawatky filed with the superior court a request for de novo trial and a petition to vacate the arbitration award on the ground of arbitrator misconduct (Code Civ. Proc., § 1286.2, subd. (c)) in that "a substantial and gross injustice has occurred . . . because of a material and substantial grave error on the part of the arbitrator in deciphering the state of

evidence in this case." In support, Drs. O'Brien and Marquardt declared that the arbitrator disregarded or "misinterpreted" their testimony that, based on his history and the EKGs, El-Hawatky was suffering a myocardial infarction in progress, that, had TPA been administered at the appropriate time, El-Hawatky stood a 75 to 85 percent chance of recovery without disability, and that it was below the standard of care for Dr. Tillinghast not to have administered TPA.

Kaiser countered with a petition to confirm the award as is.

The court confirmed the award and entered judgment for Kaiser accordingly.

This appeal followed.

DISCUSSION

I

El-Hawatky contends that the arbitration award should have been vacated because it is based on a misinterpretation of the evidence.

To say that an arbitrator disregarded or misunderstood the evidence is to say that the arbitrator's decision is inconsistent with or contrary to the facts; the argument necessarily calls for examination of the evidence given at the arbitration hearing. The general rule is that an arbitrator's decision to which the parties agree to be bound may not be reviewed for mistakes of law or fact, even if such a mistake causes substantial injustice. (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8-13; *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 587-590.) This means that, unless the

parties specify in their arbitration agreement a different scope of judicial review, a court may not review the merits of the controversy or the sufficiency of the evidence to support the arbitrator's findings. (*Morris v. Zuckerman* (1968) 69 Cal.2d 686, 691; *Pacific Gas & Electric Co. v. Superior Court, supra,* 15 Cal.App.4th at pp. 589-590; *Jordan v. Pacific Auto. Ins. Co.* (1965) 232 Cal.App.2d 127, 135.)

El-Hawatky attempts to establish an exception to this rule by characterizing misinterpretation of evidence as a violation of one's due process right to a fair trial. Unless otherwise agreed, the arbitration statutes set out the procedural rights due a party to arbitration. (See, e.g., *Smith v. Campbell & Facciolla, Inc.* (1962) 202 Cal.App.2d 134, 135-136.) As pertinent here, those rights are to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. (Code Civ. Proc., § 1282.2, subd. (d).) And if the arbitrator intends to base his decision on information obtained outside the hearing, the parties are entitled to an opportunity to meet that information. (Code Civ. Proc., § 1282.2, subd. (g).) Nowhere is it said that an arbitrator must interpret the evidence correctly. Thus, even assuming that the arbitrator misinterpreted the evidence,[6] it was not a violation of due process. (See

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[6] We do not see how, in the absence of a transcript of the arbitration proceeding, a court can determine with any confidence that evidence has been disregarded or misunderstood – for one to say that the evidence was misunderstood, one must know what that evidence was. Here, there is no arbitration transcript, only the declarations of El-Hawatky's witnesses about what they said and how they believed it was misconstrued.

Gonzales v. Interinsurance Exchange (1978) 84 Cal.App.3d 58, 63 [failure to consider evidence is not the same as refusal to hear it, and failure to consider evidence is no ground to vacate an arbitration award]; see also *Horn v. Gurewitz* (1968) 261 Cal.App.2d 255, 262 [no due process right to be represented by counsel at arbitration].) El-Hawatky's argument to the contrary relies on authority that says a party has a due process right to judicial findings based on the evidence in the case. (See, e.g., *Baltimore & Ohio Railroad Co. v. United States* (1936) 298 U.S. 349 [80 L.Ed. 1209].) That authority has no application to private, contractual arbitration. (*Rifkind & Sterling, Inc. v. Rifkind* (1994) 28 Cal.App.4th 1282.)

Nor can El-Hawatky succeed by calling misinterpretation of evidence arbitrator misconduct (Code Civ. Proc., § 1286.2, subd. (c)), a statutory ground for vacating an arbitration award. He could just as well have called it an act in excess of the arbitrator's powers (Code Civ. Proc., § 1286.2, subd. (d)) or a refusal of the arbitrator to hear material evidence (Code Civ. Proc., § 1286.2, subd. (e)); the result is the same – it is an attempt to circumvent the rule that says an arbitrator's decision may not be reviewed for factual error. (See *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 438-439 [Code Civ. Proc., § 1286.2, subd. (e), which says arbitration award may be vacated for arbitrator's refusal to hear material evidence, is not a "back door" to challenge arbitrator's legal theory of the case]; *Sampson Motors, Inc. v. Roland* (1953) 121 Cal.App.2d 491, 494 [factual basis for arbitrator's decision may not be challenged on ground of arbitrator "misbehavior" or "excess of powers"].) If misinterpretation of evidence were a legitimate reason to vacate an arbitration

award, the rule of nonreview for factual error would be swallowed, as almost every losing litigant can be expected to complain that his evidence was disregarded or misunderstood. (See *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 28.)

II

El-Hawatky contends that, under Code of Civil Procedure section 1141.20, he was entitled to a de novo trial in the superior court.[7]

Code of Civil Procedure section 1141.20 applies to judicial arbitration, not contractual arbitration. Here, the parties arbitrated El-Hawatky's claim pursuant to the provisions of the Kaiser Foundation Health Plan. That makes this private (nonjudicial) arbitration. (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 8; *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 401-402 & fn. 5; *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 431, fn. 1.)

Moreover, the Kaiser Foundation Health Plan says that claims of this sort "shall be submitted to binding arbitration." Binding arbitration means that there is no right to a de novo trial, only to the limited grounds for relief specified in Code of Civil Procedure section 1286.2. (See *Blanton v. Womancare, Inc., supra,* 38 Cal.3d at pp. 399-401, 402.)

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[7] Code of Civil Procedure section 1141.20 says, "(a) An arbitration award shall be final unless a request for a de novo trial is filed within 30 days after the date the arbitrator files the award with the court. [¶] (b) Any party may elect to have a de novo trial, by court or jury, both as to law and facts."

El-Hawatky argues that, because the stipulated order recites that "all California statutes, including the California Code of Civil Procedure," shall apply to the arbitration, then Code of Civil Procedure section 1141.20 must apply. The argument is frivolous; if the contractual arbitration statutes apply, then, as a matter of law, the judicial arbitration statutes do not. (See Code Civ. Proc., § 1141.30; *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1794-1795, fn. 2.)

The judgment is affirmed.

/s/ BLEASE, Acting P.J.

We concur:

/s/ SIMS, J.

/s/ BROWN, J.

APPENDIX D

Third Appellate District No. C017588
S044904

IN THE SUPREME COURT OF CALIFORNIA

(Filed March 22, 1995)

MOHAMED EL-HAWATKY Et Al., Appellants

v.

KAISER FOUNDATION HOSPITALS Et Al., Respondents

Appellants' petition for review DENIED.

/s/ LUCAS
Chief Justice
